

Supreme Court, U.S.
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**In the Supreme Court of the
United States**

October Term, 1977

No. **77-1594**

ELIJAH W. RATCLIFF,

Petitioner

vs.

WILLIAM J. ESTELLE, JR., Director of the
Texas Department of Corrections,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

ELIJAH W. RATCLIFF,
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Opinions Below

1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.

ELIJAH W. RATCLIFF,

Petitioner

vs.

WILLIAM J. ESTELLE, JR., Director of the Texas Department of Corrections,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Chief Justice, and the Justices of the Supreme Court of the United States:

OPINIONS BELOW

The decisions of the courts below are twofold in nature as rendered by the United States District Court for the Southern District of Texas under dockets numbered CA No. 75-H-1945 and CA No. H-77-1542, wherein Petitioner was Plaintiff and Respondent was Defendant. Both final judgments were appealed to the United States Court of Appeals, Fifth Circuit, wherein the earlier pro-

Opinions Below

ceeding was docketed No. 77-8424 and the latter was docketed No. 78-8093. Petitioner's motion to consolidate the proceedings was granted by such Court of Appeals which refused the ultimate procedural and resulting substantive relief sought in the subject applications for certificates of probable cause necessitating this appeal. Copies of the unreported final judgment in both trial proceedings as well as the order of the United States Court of Appeals, Fifth Circuit, substantively declining an application for certificate of probable cause are attached as Appendix A.

Jurisdiction

JURISDICTION

The Order of the United States Court of Appeals for the Fifth Circuit giving rise to this Petition was rendered and entered on the 27th day of March, A. D., 1978, and no motion for rehearing or for an extension of time is relevant hereto.

The subject habeas corpus action under *Vernon's Ann. C.C.P.*, Art. 11.01-11.64, inclusive, and Title 28, *United States Code*, Sections 1981-1995, inclusive, in addition to *United States Code, Const.*, Art I, Section 9 (2) and (3); *United States Code, Const.*, Art. III, Section 2 (1) and *United States Code, Const.*, Amend. V, VIII, XIII, XIV and XV.

Jurisdiction of the Supreme Court of the United States to entertain and grant the relief sought by Petitioner is further provided by Title 28, *United States Code*, Section 1254 (1), consistent with Title 28, *United States Code*, Section 2101 (c), and U.S. Sup. Ct. Rules 21, 22 and 23, 28 U.S.C.

QUESTIONS PRESENTED

I. Petitioner's exhaustion of State remedies was completed prior to filing each of the subject applications for writs of habeas corpus in the United States District Court.

II. The statutory authority upon which the State of Texas relied for the subject conviction was non-existent or unconstitutionally vague under federal due process standards.

III. The systematic exclusion of Negro citizens from the material Polk County, Texas Grand Jury resulted in a fatally defective indictment against Petitioner.

IV. The trial Court abused its discretion surpassing constitutional dimensions in refusing to routinely permit Petitioner's tax records to raise a jury issue on failure of consideration.

V. The trial Court abused its discretion unconstitutionally in permitting the jury to consider an unrelated and distinguished transaction wherein Petitioner exercised rights of a payor on a negotiable instrument.

VI. The subject proceedings were calculated through official neglect and disregard or design and intent to deprive Petitioner of due process globally.

VII. Petitioner's conviction in the District Court of Montgomery County, Texas, No. 11,064, should be voided, his illegal detention and restraint upon liberty by respondent forbidden and his rights as a citizen declared.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The most proximal constitutional authorities pertinent to Petitioner's position are *United States Code, Const. Amend. V, VIII, XIII, XIV and XV*.

Also, underlying the authority for the remedies presented by Petitioner are *United States Code, Const. Art I, Section 9(2) and (3), and United States Code, Const. Art. III, Section 2(1), and Vernon's Ann. St. Const., Art. I, Section 19*.

The federal jurisdictional grounds invoked by Petitioner are set forth at Title 28, *United States Code, Sections 2241-2254, inclusive, and Title 42, United States Code, Sections 1981-1995, inclusive*.

Certain elements of Petitioner's cause of action have been raised in the lower courts pursuant to Title 28, *United States Code, Sections 1343, 1443, 1446, 1447(d), 1449, 1651 and 1652*. However, as such provisions in addition to *United States Code, Const. Art. I, Section 9(2) and (3), and Art. III Section 2(1), as well as Vernon's Ann. St. Const., Art. I, Section 19*, are either not contested or not currently in dispute relevant to the jurisdiction of this Court, no quotation of such provisions is included as a part of this Petition.

Each of the other designated provisions, however, is attached at Appendix B to expedite space and brevity in the Petition.

Constitutional and Statutory Provisions Involved

State authorities of precedential value upon which Petitioner relies are *V.T.C.A., Bus. & C.*, §§2.601, 2.606, 2.608, 2.721, 3.409, 3.417, 4.303 and 4.403; and *Vernon's Ann. Civ. St.*, Art. 3713, Rules 5 and 6. The authorities upon which the State of Texas relied were *Vernon's Ann. P.C.*, Art. 1410 and 1413, each of which is set forth in its entirety at Appendix B.

It is noteworthy that *Vernon's Ann. C.C.P.*, Art. 5.01, was instrumental in shaping the line of precedent which influenced Petitioner's remedy herein, but as such provision is currently repealed, it is not set forth verbatim in the petition.

Statement of Case

STATEMENT OF CASE

The final judgment of the United States District Court, CA No. 75-H-1945, wherein Petitioner, Elijah W. Ratcliff, makes application for a writ of habeas corpus is attached hereto as an Appendix.

The State action arises under *Vernon's Ann. C.C.P.*, Art. 11.01-11.64, inclusive, and the federal action is by virtue of Title 28, *United States Code*, §§2241-2254, inclusive, and is further supported by Title 42, *United States Code*, §§1981-1995, inclusive, in addition to *United States Code, Const.*, Amend. V, VIII, XIII, XIV and XV, as appears more elaborately hereinafter.

Petitioner is illegally restrained in his liberty by Respondent, William J. Estelle, Jr., Director of the Texas Department of Corrections, by virtue of a judgment of the District Court of Montgomery County, Texas, No. 11,064, directing Appellant to serve six (6) years in the Texas Department of Corrections on a charge of theft. Sentence under the described judgment was pronounced under date of July 26, 1972 (Tr. Item 61, pp. 150-151), in response to a verdict of guilty upon a plea of not guilty before a jury under the Honorable J. S. Holleman, Presiding Judge, who refused motions for judgment upon the evidence (No. 47,600, SF pp. 66-69, 133-135), for a new trial (No. 47,600, Tr. Item 63, pp. 156-161) and in arrest of judgment (No. 47,600, Tr. Item 62, pp. 152-155), all timely presented.

Statement of Case

The described judgment and deliberations were timely appealed to the Court of Criminal Appeals of Texas and affirmed. *Ratcliff v. Texas*, 504 S.W. 2d 883 (1974).

A timely appeal was then perfected to the Supreme Court of the United States, but officials of the Texas Department of Corrections systematically precluded preparation of a timely jurisdictional statement for filing pursuant to U. S. Supreme Court Rules 13 and 15 or 21, 22 and 23, 28 U.S.C. (See No. 75-208, October Term, 1975.)

Appellant was assigned No. 238244 by the Texas Department of Corrections and finally issued a Certificate of Parole, No. 77 0400, by the Board of Pardons and Paroles of the State of Texas, effective February 8, 1977, resulting in the current state of restraint complained of herein.

The issues as set forth at the Questions Presented herein were presented in habeas corpus proceedings, in addition to direct appeal, in the State and Federal Courts in exhaustion of State trial Court and then appellate remedies followed by Federal trial and appellate remedies (See No. 4624, Court of Criminal Appeals of Texas; No. CA-75-H-1945, and No. CA-H-77-1542, United States District Court, Southern District of Texas; and No. 77-8424 and No. 78-8093, United States Court of Appeals for the Fifth Circuit).

Summary of Argument

GROUND SUSTAINING FEDERAL QUESTIONS

SUMMARY OF ARGUMENT

Each stage of the subject proceeding before the State judiciary was tainted by fraud, neglect and a conspiracy to deprive Petitioner of due process. Title 42, *United States Code*, §§1981, 1982 and 1983; *United States Code, Const.*, Amend. V, VIII and XIV.

The initial deprivation consisted of the systematic exclusion of Petitioner's peers, Negro citizens, from the Polk County, Texas Grand Jury relevant to the indictment, and the State courts, with the notorious abstention of the United States District Court, have schematically avoided all procedures, including discovery, to effectively establish such illegalities through competent evidence.

After the indictment was returned, discovery efforts were ignored in the District Court of Polk County, Texas, No. 9432, and the United States District Court, Cr. No. 71-H-228, remanded the proceeding to State court after discovery efforts were in motion but before the time to respond deadline transpired. *Federal Rules Civ. Proc.*, Rule 33, 28 U.S.C.; *Vernon's Ann. Rules Civ. Proc.*, Rule 168.

Other pre-trial procedures in the State courts, including motions for change of venue, were similarly reduced to jest. *United States Code, Const.*, Amend. V and XIV.

Summary of Argument

During the trial stage, the mockery of justice was continued with perjured testimony by the complaining witness and the trial Court's refusal to allow Petitioner to raise the issue of failure of consideration with respect to the check which was the alleged medium of theft. *V.T.C.A., Bus. & C.*, §§3.409, 3.417, 4.303 and 4.403; *Vernon's Ann. P.C.*, Art. 5.01.

Honoring well established precedents in Texas would have effected a reversal of the trial Court's judgment in spite of the attending fraud and deception, but such authorities and precedents were not addressed by the appellate Court. *Tarkington v. Brunett*, 51 S.W. 274 (1899); *Hesbrook v. State*, 194 S.W. 2d 260 (1946); Title 42, *United States Code*, §§1981-1995, inclusive.

Argument

ARGUMENT

Argument—Discussion of Facts and Authorities I

The issues raised by Petitioner's Application for Writ of Habeas Corpus (Tr./US DC, 9/4/75, unnumbered docket Item) were clearly exhausted in efforts transpiring before the filing of such application in the United States District Court.

The controlling authorities hold consistently that an applicant for habeas corpus relief need only exhaust his State remedies on one occasion. *Kemp v. Pate*, 359 F.2d 749 (1966); *Pryor v. Beto*, 460 F.2d 307 (5th Cir. 1972). Following exhaustion of State remedies, the principle of *Haines v. Kerner*, 405 U.S. 948 (1972); 30 L.E.2d 819, 92 S.Ct. 963; and general precedents on the habeas corpus remedy prevail. Title 28, *United States Code*, §§2241, 2242 and 2243; *United States Code, Const.*, Amend. V and XIV; *Bruce v. Beto*, 96 F.2d 212 (1968); *Price v. Johnson*, 334 U.S. 266 (1948), 92 L.E. 1356, 68 S.Ct. 1049.

Petitioner's State remedies were so clearly exhausted establishing the irregularities of State action that Respondent refused to respond to Petitioner's request for admissions served on the 19th day of November, A.D., 1976 (Tr./US DC Item 21). *Federal Rules Civ. Proc.*, Rule 36, 28 U.S.C.; Title 42, *United States Code*, §§1981, 1982 and 1983.

Argument

Such refusal to respond at any point or object in any manner to the request for admissions covering a substantial period of time as filed with the Clerk and served on the Attorney of Record for Respondent in the United States District Court operated to admit the truth of the matters asserted in such request for admissions, several of which facts are crucial to Petitioner's cause of action (Tr./US DC Item 21). *Federal Rules Civ. Proc.*, Rule 36, 28 U.S.C.; *United States Code, Const.*, Amend. V, VIII, XIII, XIV and XV; *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (1970), affirmed 451 F.2d 593, certiorari denied 408 U.S. 922.

Under docket number CA No. H-77-1542, the United States District Court did not determine that State remedies had been exhausted as it had suggested under docket number CA No. 75-H-1945, and Respondent did not raise such issue in the second appeal, as it had in the earlier proceeding, so reference to such point in this petition for writ of certiorari is merely to foster clarity and coherence.

Argument—Discussion of Facts and Authorities II

The vagueness of the subject legislation as applied to Petitioner is the basic error of the case. *Vernon's Ann. P.C.*, Arts. 1410 and 1413; *Bouie v. City of Columbia*, 378 U.S. 347 (1964), 12 L.E.2d 894, 84 S.Ct. 1697; *Douglas v. Buder*, 412 U.S. 430 (1973), 37 L.E.2d 52, 93 S.Ct. 2199. Due process requires that a criminal statute give fair warning of the conduct it prohibits, and the highest court of a State cannot circumvent the legislature and achieve such a result by judicial construction. *Hes-*

Argument

brook v. State, 194 S.W. 2d 260 (1946); *Beard v. State*, 287 S.W. 2d 667 (1956); *V.T.C.A., Bus. & C.*, §§3.409, 3.417, 4.303 and 4.403; Title 42, *United States Code*, §§ 1981, 1982 and 1983; *Malphus v. Home Savings Bank of City of Albany*, 254 N.Y.S. 2d 980 (1965); *Baggett v. Buliitt*, 377 U.S. 360 (1964), 12 L.E.2d 377, 84 S.Ct. 131 (1965). *Younger v. Harris*, 401 U.S. 37 (1971), 27 L.E.2d 669, 91 S.Ct. 746.

Argument—Discussion of Facts and Authorities III

The indictment in question was returned against Petitioner by a racially discriminatory Grand Jury in the District Court of Polk County, Texas, No. 9432 (Tr. Item 4, pp. 5-6). The issue of systematic exclusion of Negroes from the Polk County, Texas Grand Jury was raised initially by pre-trial petition filed while in the District Court of Polk County, Texas, No. 9432, but Petitioner's efforts to establish Grand Jury discrimination by specific interrogatories were stifled (Tr. Item 19, pp. 52-63; also, Tr. Item 35, p. 97, SF pp. 1-2). *Norris v. Alabama*, 294 U.S. 587 (1935), 79 L.E. 1074, 55 S.Ct. 579; *Alexander v. Louisiana*, 405 U.S. 625 (1972), 31 L.E.2d 536, 92 S.Ct. 1221.

The described systematic exclusion of Petitioner's peers as practiced and sanctioned by the material courts denied him the essential elements of a fair trial. *Vernon's Ann. C.C.P.*, Art. 19.27; Title 42, *United States Code*, §§1981, 1982 and 1983; *Hill v. Texas*, 316 U.S. 400 (1944), 86 L.E. 1559, 62 S.Ct. 1159; *Akins v. Texas*, 325 U.S. 398 (1945), 89 L.E. 1692, 16 S.Ct. 1276.

Argument

The issue of Grand Jury discrimination could not be raised as prescribed by *Vernon's Ann. C.C.P.*, Art. 19.27, for the material judiciary did not at the current point in history permit Negroes to engage meaningfully and reliably in any stage of the grand jury process.

In addition to pre-trial efforts to raise the grand jury systematic exclusion issue, it was raised through an application for writ of habeas corpus purporting to be in behalf of Petitioner by one Attorney Raymond Jordan of 2521 Riverside Drive in Houston, Texas 77004, without advance consultation or discussion with Petitioner regarding such application (Application for Writ of Habeas Corpus of 1974, No. 4624, Tr. Item 2, pp. 2-8). *Vernon's Ann. C.C.P.*, Arts. 11.01-11.64.

Much of the contents of the described application is inconsistent with fact and Petitioner's authorized contentions. However, each of its paragraphs referring to Grand Jury discrimination is substantively correct and adoptable by Petitioner. *Norris v. Alabama*, 294 U.S. 587 (1935), 79 L.E. 1074, 55 S.Ct. 579; *Alexander v. Louisiana*, 405 U.S. 625 (1972), 31 L.E. 2d 536, 92 S.Ct. 1221.

Argument—Discussion of Facts and Authorities IV

The evidence presented at the trial showed that on the 6th day of April, A. D., 1970, Petitioner obtained from Helton-Hodges Motor Company in Livingston, Texas a 1966 Chevrolet pick-up truck tendering a check for the consideration (SF pp. 98-104 and 187). The vehicle

Argument

proved defective following delivery to Petitioner without the opportunity for prior inspection, and he refused to permit the check to be paid in due course. *V.T.C.A., Bus. & C.*, §§2.601, 2.606, 2.608, 2.721 and 4.403.

Notwithstanding complaining witness' refrain from testifying that the subject vehicle was in good condition (SF pp. 113 and 115), and Petitioner's presenting of tax records reflecting multiple repair charges to show the defective condition of the vehicle (SF pp. 90-91), the trial Court refused to permit such records to raise the issue of failure of consideration and an intent to engage a lawful transaction on the part of Petitioner (SF pp. 176-186). *V.T.C.A., Bus. & C.*, §§2.601 (a) and 4.403.

To the contrary, even though the Statement of Facts as transcribed by Official Court Reporter Mary Frances Dameron does not contain the interjections and miscellaneous related developments, an aura of impropriety was created by the prosecution and sanctioned by the trial Court with respect to the described evidence offered by Petitioner. *Vernon's Ann. P.C.*, Art. 37.09 and 37.10; Title 42, *United States Code*, §§1981, 1982 and 1983; *United States Code, Const.*, Amend. V, VIII and XIV.

The detrimental effect of such irregularities could have been reduced by a proper charge including a reference to the distinctions between a solvent account and a fictitious or otherwise fraudulent account and legal distinctions between a transaction for cash and one where a check is the exchange medium (Tr. Item 57, pp. 136-138). *V.T.C.A., Bus. & C.*, §§3.409, 3.417, 4.303 and 4.403; *Tarkington v. Brunett*, 51 S.W. 274 (1899); *Anderson v. O'Bryant*, 3 S.W. 2d 842 (1928); *Vernon's Ann.*

Argument

Civ. St., Art. 3713, Rules 5 and 6; *Bledsoe v. Yarborough*, 412 S.W. 2d 222 (1967); *Hamilton v. Newburg*, 412 S.W. 2d 801 (1967); *Modine Manufacturing Co. v. Northeast Independent School District*, 503 S.W. 2d 833 (1974); *United States Code, Const.*, Amend. V, VIII, XIII, XIV and XV.

The State court record shows without controversion that the seller, Helton-Hodges Motor Company, made an independent examination of the subject check, and the issue was established that such seller did not rely to its detriment on any representation of Petitioner (SF p. 42, pp. 51-52). *Beard v. State*, 287 S.W. 2d 667 (1956); *Eason v. State*, 320 S.W. 2d 11 (1959).

This issue was further developed by the evidence admitted of Petitioner's bank statements from the Chase Manhattan Bank, N.A., One Chase Manhattan Plaza, New York, N. Y. 10015, as they established without controversion the solvency of the subject account with the Chase Manhattan Bank (SF pp. 91-99). *Anderson v. O'Bryant*, 3 S.W. 2d 842 (1928); *V.T.C.A., Bus. & C.*, §§3.409 and 3.417.

Argument—Discussion of Facts and Authorities V

The trial Court abused its constitutional discretion in permitting the jury to consider an unrelated and improper transaction, eloquently distinguished from the subject transaction, wherein Petitioner exercised rights of a payor on a negotiable instrument (SF pp. 121, 123 and 128). *Tarkington v. Brunett*, 51 S.W. 274 (1899); *Vernon's*

Argument

Ann. Rules Civ. Proc., Rule 185; *United States Code, Const.*, Amend. V, VIII, XIII, XIV and XV.

The unrelated transaction involved a check payable to Angelina Chevrolet-Cadillac Company admitted into evidence over the timely objection of Petitioner. Such Company was indebted to Petitioner through an agency relationship for an off-set in an amount exceeding substantially the amount of the draft admitted into evidence (SF p. 121), and the procedures of the State trial Court circumvented Petitioner's conventional rights under negotiable instruments law. *Vernon's Ann. Rules Civ. Proc. Rules*, 185; *Vernon's Ann. Bus. & C.*, §§3.409, 3.417, 4.303 and 4.403. Similarly, the ruling, in conjunction with the trial Court's refusal to instruct or charge the jury on the issue (Tr. Item 57, pp. 136-138), circumvents Petitioner's statutory right to exercise self-help in preventing a criminal act against him. *Vernon's Ann. C.C.P.*, Art. 5.01; *Vernon's Ann. Bus. & C.*, §§4.303 and 4.403; Title 42, *United States Code*, §§1981, 1982 and 1983.

Argument—Discussion of Facts and Authorities VI

The theme of the trial Court judiciary of the State of Texas, along with its prosecutors, was a global effort calculated to deprive Petitioner of due process and his rights as an American Citizen (Tr. Item 62, pp. 152-155; Item 63, pp. 156-161). *United States Code, Const.* Amend. V, VIII, XIII, XIV and XV. Such irregularities may be appreciated most graphically by following an event to event observation of the most typical prejudicial irregularities.

Argument

While the litigation was in Polk County, Texas, the judiciary revealed its contempt for Petitioner by summarily denying his motion seeking to set aside the indictment (Tr. Item 35, p. 97, SF pp. 1-2). This obviously prevented the record from reflecting a plenary and formal disposition of Petitioner's objection to the pertinent Grand Jury composition. *Vernon's Ann. C.C.P.*, Art. 19.27; *Norris v. Alabama*, 294 U.S. 587 (1935), 79 L.E. 1074, 55 S.Ct. 579; *Eubanks v. Louisiana*, 356 U.S. 584 (1958), 2 L.E.2d 991, 78 S.Ct. 970; *Alexander v. Louisiana*, 405 U.S. 625 (1972), 31 L.E.2d 536, 92 S.Ct. 1221.

The second notorious irregularity was the refusal of the trial Court to sequester the petit jury. *Vernon's Ann. C.C.P.*, Art. 35.23; *Burris v. State*, 40 S.W. 284 (1898). The injury attached to jurors being subjected to unlimited contacts and potential influences is too obvious to belabor and duplicitous discussion of the factor is not merited.

Another irregularity which impeaches the integrity of the State trial Court was the inability of the complaining witness, Leonard Hodges, to identify the vehicle allegedly taken through theft (SF p. 38) in light of Petitioner's motion for judgment after the prosecution had rested its case (SF pp. 66-69). *Hall v. State*, 219 S.W.2d 475 (1949); *May v. State*, 34 S.W.2d 594 (1930).

It is, also, unconscionable that the State Trial Court would deny Petitioner's motion for judgment where the complaining witness admitted in sworn testimony before the Court and jury that he made multiple independent examinations and evaluations of the subject draft without relying on any representation by Petitioner (SF p. 42, pp. 51-52). *Anderson v. O'Bryant*, 3 S.W.2d 842 (1928).

Argument

It is emphasized that relevant irregularities were not limited to judicial acts, but Official Court Reporter Mary Frances Dameron, also, contributed to the mockery of justice. *Muncy v. Johnston*, 402 S.W.2d 525 (1966). At SF p. 55, she failed to note Petitioner's exception to the ruling of the trial Court admitting testimony elicited through leading questions of law from the complaining witness, Leonard Hodges, that title to the subject vehicle had left him. *Vernon's Ann. P.C.*, Art. 37.09 and 37.10; *Capitol Hotel Company v. Rittenberry*, 41 S.W.2d 697 (1931); *Paxton v. Spencer*, 503 S.W.2d 637 (1973).

The next gross violation of legal procedures and due process involved the trial Court's denial of Petitioner's motion to question a witness, Gilbert Woods of Goodrich, Polk County, Texas, as an adverse witness (SF p. 73). Such witness had been employed by seller for several years, and the fear of seller attached to him by virtue of such relationship merited granting of Petitioner's motion to examine him as an adverse witness. *Webb v. State*, 7 S.W.2d 562 (1928).

Again at page 123 of the Statement of Facts, from the State Court, the unjust character of the proceedings was manifest in the continuation of hearsay evidence before the jury which though nominally disapproved by such Court prejudiced Petitioner's case more than an instruction to disregard could rectify. *O'Beirne v. State*, 365 S.W.2d 787 (1963).

Still more procedurally unfair was the refusal of the State Court to require witness B. A. Hunter to answer before the jury, "Did you get an insurance company to pay you on insurance that was obtained by Elijah W. Rat-

cliff?" This testimony, truthfully recited, would have approached proper depiction of Petitioner's position that the witness had a fraudulent, profit-making, overriding objective, for impeachment purposes (SF p. 129). Lon L. Fuller, *Basic Contract Law*, West Publishing Co., St. Paul, Minn. (1947), p. 285; *Vernon's Ann. C.C.P.*, Art. 39.13.

Again at SF p. 132, Petitioners sought to protect the jury from unlimited outside influences, but the State Trial Court denied the request to sequester it, allowing such jury to roam freely as though nothing was at stake. *Vernon's Ann. C.C.P.*, Art. 35.23.

Perhaps the most material irregularity of the multitude involves Court Reporter Mary Frances Dameron's failure to include the full discussions surrounding the submission of the charge to the jury as a part of the record. Her transcription deletes all description of the State Trial Court's refusal to entertain the discussions on the jury charge in open court even though it does show that certain elements of proposed jury charges and instructions from Petitioner would have presented the law applicable to the case in a less vague context. *Vernon's Ann. P.C.*, Art. 37.09 and 37.10; *Baggett v. Bullitt*, 377 U.S. 360 (1964), 12 L.E.2d 377, 84 S.Ct. 1316; *Younger v. Harris*, 401 U.S. 37 (1971), 27 L.E.2d 669, 91 S.Ct. 746.

During the arguments to the jury, the most prejudicial irregularities consisted of repetitious interruptions by the prosecutors, apparently to curry favor with the jury, where not a semblance of an objection was proper (SF p. 151); the extension of the prosecutors' argument to contexts unrelated to and inconsistent with statements and testimony during the presentation of evidence (SF pp.

154-157); and the comparable extension of the prosecutors' argument to speculation on law at SF pp. 160-161 even though similar argument was declined Petitioner in spite of the fact Petitioner's argument was geared to correct a deficiency inherent in the jury charge (SF p. 152). 56 *Tex. Jur. 2d*, Trial, §240; *Vernon's Ann. Bus. & C.* §§3.409, 3.417, 4.303 and 4.403; *Fultz v. First National Bank*, 380 S.W.2d 894 (1964).

Also, a further noteworthy irregularity on the part of Official Court Reporter Mary Frances Dameron was the striking of the prefix "in" from "inconsistent" to avoid Petitioner's objection to arguments by the prosecutors which were inconsistent with the evidence received during presentation of cases (SF pp. 154-157). *United States Code, Const. Amend. V, VIII, XIII, XIV and XV*; *Vernon's Ann. P.C.*, Art. 37.09 and 37.10; *Jordan v. Massachusetts*, 225 U.S. 167 (1912), 56 L.E. 1038, 32 S.Ct. 651; *Johnson v. Mississippi*, 403 U.S. 212 (1971), 29 L.E.2d 423, 91 S.Ct. 1778.

Argument—Discussion of Facts and Authorities VII

Petitioner's conviction in the District Court of Montgomery County, Texas, No. 11,064, should be voided; his illegal restraint upon liberty terminated, and his rights as a citizen declared. *Vernon's Ann. C.C.P.*, Art. 11.01-11.64, inclusive; Title 42, *United States Code*, §§1981, 1982 and 1983; *Miller v. Winn*, 28 S.W.2d 578 (1930); *Pryor v. Beto*, 460 F.2d 307 (1972); *Fay v. Noia*, 372 U.S. 391 (1963), 9 L.E.2d 837, 83 S.Ct. 822; *Cox v. Louisiana*, 379 U.S. 536 (1965), 73 L.E.2d 471, 85 S.Ct. 453.

Argument

CONCLUSION

The mandate of the Supreme Court of the United States should order the United States Court of Appeals, Fifth Circuit, to direct the United States District Court for the Southern District of Texas, Houston Division, to issue the writ of habeas corpus without day commanding Respondent to show cause why the relief sought by Petitioner in the habeas corpus action before such United States District Court should not be granted and why the judgment of conviction returned against Petitioner in the District Court of Montgomery County, Texas, No. 11,064, affirmed by the Court of Criminal Appeals of Texas, No. 47,600, should not be canceled, annulled and voided. Title 28, *United States Code*, §§1651, 1652, 2241, 2242 and 2243; *United States Code*, Const. Amend. V, VIII, XIII, XIV and XV.

Date

ELIJAH W. RATCLIFF
Petitioner Pro Se

P. O. Box 862
Livingston, Texas 77351
Ph. 713—327-4948

Certificate of Service

CERTIFICATE OF SERVICE

I, Elijah W. Ratcliff, Petitioner, Pro Se, in the foregoing Petition for Writ of Certiorari, certify that copies of such printed petition have been served in triplicate on the Honorable John L. Hill, Attorney General of Texas, Supreme Court Building, Austin 78711 as the Attorney for Respondent by first class United States mail this day of A.D., 1978.

Petitioner, Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. 75-H-1945

Elijah W. Ratcliff,

Petitioner

v.

W. J. Estelle, Jr., Director, Texas Department of Correc-
tions, et al.,

Respondents

FINAL JUDGMENT

BE IT REMEMBERED that the above entitled and numbered habeas corpus action came on for a determination on Respondent's Amended Motion To Dismiss, and it appearing to the Court that respondent's motion should be granted for the reasons stated in the Court's Memorandum and Order of January 27, 1977.

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED that Respondent's Amended Motion To Dismiss be, and the same hereby is, GRANTED and the above entitled and numbered action is accordingly hereby DISMISSED without prejudice for failure to exhaust state remedies as to all of the claims raised in his petition.

This is a FINAL JUDGMENT.

The Clerk shall file this Final Judgment and send a copy to the parties.

DONE at Houston, Texas, this 28th day of June, 1977.

(s) James Noel
Judge Presiding

Memorandum and Order, Jan. 20, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. H-77-1542

Elijah W. Ratcliff,

Petitioner

vs.

W. J. Estelle, Jr.,

Respondent

MEMORANDUM AND ORDER

This cause of action is before the Court on the Appellant's Application for Certificate of Probable Cause. The Court has considered the Application and hereby ORDERS:

Appellant's Application for Certificate of Probable Cause is DENIED.

The Court is of the opinion that a certificate of probable cause should not issue pursuant to Fed. R. App. P. 22 (b) because this appeal is frivolous.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

Memorandum and Order, Jan. 20, 1978

Done at Houston, Texas, this 20 day of January, 1978.

(s) Woodrow Seals

United States District Judge

Memorandum and Order, Dec. 19, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. H-77-1542

Elijah W. Ratcliff,

Petitioner

vs.

W. J. Estelle, Jr.,

Respondent

MEMORANDUM AND ORDER

This cause of action is before the Court on the Petitioner's application for writ of habeas corpus. Petitioner, in his present writ application, contends the following:

1. that he was convicted under an unconstitutionally vague statute;
2. that Blacks were systematically excluded from the Grand Jury;
3. that the trial court abused its discretion in refusing to permit Petitioner's tax records into evidence;

Memorandum and Order, Dec. 19, 1977

4. that the trial court abused its discretion in admitting evidence that Petitioner had stopped payment on a check in another transaction; and

5. that the proceedings in the district court were calculated to deprive Petitioner of due process and that such actions influenced the conduct of the officials of the Texas Board of Pardons and Paroles.

The Court having considered the pleadings and the response thereto is of the opinion that Petitioner's application for writ of habeas corpus should be and the same is hereby dismissed.

First, Petitioner's contention that he was convicted under an unconstitutionally vague statute is without merit. The Fifth Circuit has held that habeas corpus is not a proper means for attacking a statute on the ground of facial unconstitutionality, *Walters v. Clement*, 544 F.2d 1340 (5th Cir. 1977). Thus, in the absence of allegations that the statute as applied to Petitioner was unconstitutional, Petitioner is not entitled to habeas corpus relief.

Secondly, Petitioner's allegation that Blacks were systematically excluded from the Grand Jury is a mere conclusion as he has failed to state any facts supporting this allegation. Petitioner must do more than assert conclusions. *Woodward v. Beto*, 447 F.2d 103 (5th Cir. 1971). Also, Petitioner's failure to object to the makeup of the Grand Jury prior to trial waived any arguable defect in the constitution of such juries. *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708 (1976). Petitioner, therefore, is not entitled to habeas corpus regarding this allegation.

Third, Respondent contends that Petitioner's contention that the trial court erred in refusing to permit Peti-

Memorandum and Order, Dec. 19, 1977

tioner's tax records into evidence, even if true, does not raise an issue of constitutional dimension upon which federal habeas corpus relief might be granted.

Petitioner's contention raises a question of the propriety of evidentiary findings. These are matters determined by state courts and are not amenable to federal habeas corpus relief. *Nelson v. Moriarty*, 484 F.2d 1034 (1st Cir. 1973).

The Fifth Circuit, in *Heads v. Beto*, 468 F.2d 241 (5th Cir. 1972), held that questions concerning the admissibility of evidence are not subject to a review by a federal court in a habeas corpus proceeding unless the error is of such a magnitude as to deny fundamental fairness to the criminal trial. Respondent asserts that error, if any, does not rise to the level of a denial of such fundamental fairness.

Fourth, Petitioner's allegation that the trial court erred in admitting evidence of an extraneous transaction does not state a cause of action upon which relief may be granted. Admission of evidence of extraneous offenses in a state trial does not present a federal question upon which habeas corpus relief may be predicated. *Murphy v. Beto*, 416 F.2d 98 (5th Cir. 1969); *Heads v. Beto*, 468 F.2d 241 (5th Cir. 1972).

Respondent would note that the trial judge did not err in admitting the evidence. The State offered the evidence regarding the transaction for the limited purpose of showing intent (see Statement of Facts, p. 108) and the jury was clearly advised of this fact in the jury charge. Evidence of such extraneous offense may be admitted into evidence to show the scheme, design, identity, or intent.

Memorandum and Order, Dec. 19, 1977

Newman v. Texas, 485 S.W.2d 576 (Tex. Crim. App. 1972); *Nees v. Culbertson*, 406 F.2d 621 (5th Cir. 1969).

Finally, Petitioner's contention that the proceedings in the district court were calculated to deprive Petitioner of due process and that such actions influenced the conduct of the officials of the Texas Board of Pardons and Paroles is conclusory in nature and as such does not entitle Petitioner to federal habeas corpus relief. *Woodward v. Beto*, 447 F.2d 103 (5th Cir. 1971). Generalities are not sufficient. Specific factual allegations are required.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

Done at Houston, Texas, this 19th day of December, 1977.

(s) Woodrow Seals
United States District Judge

Memorandum and Order, Court of Appeals

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

March 27, 1978

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504—589-6514

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW:

No. 77-8424—Elijah Ratcliff vs. W. J. Estelle
(Dist. Ct. No. 75-H-1945)

No. 78-8093—Elijah Ratcliff vs. W. J. Estelle
(Dist. Ct. No. 77-1542-CA-H)

The following action has this day been taken in the
above case:

- () Motion to proceed on the original record granted.
- () Motion to proceed on the original record and typewritten brief granted.
- () Motion to consolidate granted.
- () Motion to supplement or correct record granted.
- () Motion for leave to file supplemental brief granted.

Memorandum and Order, Court of Appeals

- () Motion for leave to file brief amicus curiae is granted.
- () Motion for leave to file brief in preliminary type written form is granted.
- () Joint motion as to time for filing briefs granted.
- (X) Order enclosed has been entered.
- ()

cc Mr. Elijah W. Ratcliff (w/personal papers) ✓
Mr. Alvin K. James
Mr. John Pierce Griffin
Mr. V. Bailey Thomas, Clerk

P.S. to Mr. Thomas: Returned herewith are your original papers in No. 77-1542-CA-H to be certified as the record on appeal.

Also returned herewith are your original papers in No. 75-H-1945. Please acknowledge receipt.

Edward W. Wadsworth,
Clerk

By Clare F. Sachs
Deputy Clerk

Memorandum and Order, Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Nos. 77-8424 & 78-8093

Elijah W. Ratcliff,

Petitioner

versus

W. J. Estelle, Jr.,

Respondent

On Application for Certificate of Probable Cause

ORDER

These cases were consolidated on the unopposed motion of petitioner. The Court has been holding No. 77-8424 pending *en banc* resolution of a case dealing with the exhaustion question there presented. However, because state remedies have now been exhausted and the same issues are raised in No. 78-8093, petitioner's *pro se* application for certificate of probable cause in No. 77-8424 is DENIED. However, petitioner's *pro se* application for certificate of probable cause in No. 78-8093 is GRANTED.

SO ORDERED.

(s) Homer Thornberry
United States Circuit Judge

Statutory Provisions

APPENDIX B

UNITED STATES CODE, CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CODE, CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CODE, CONST. AMEND. XIII

1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have authority to enforce this article by appropriate legislation.

UNITED STATES CODE, CONST. AMEND. XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for the President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or

hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, CONST. AMEND. XV

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

Statutory Provisions

TITLE 42, UNITED STATES CODE, SECTION 1981

Equal Rights Under the Law

ALL persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of parties.

TITLE 42, UNITED STATES CODE, SECTION 1982

Property Rights of Citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

TITLE 42, UNITED STATES CODE, SECTION 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. Sec. 1979).

Statutory Provisions

TITLE 42, UNITED STATES CODE, SECTION 1984

Same; Review of Proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

TITLE 42, UNITED STATES CODE, SECTION 1985

Conspiracy To Interfere With Civil Rights

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court or from testifying to any

Statutory Provisions

matter pending therein freely, fully, and in any such court, or to injure such party or witness in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the law;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of

Statutory Provisions

such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege, of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. Sec. 1980.)

TITLE 42, UNITED STATES CODE, SECTION 1986
Same; Action for Neglect To Prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action accrued. (R.S., Sec. 1981.)

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TITLE 42, UNITED STATES CODE, SECTION 1987

Prosecution of Violation of Certain Laws

The United States attorneys, marshals, the commissioners appointed by the district and territorial courts, with power to arrest, imprison or bail offenders, and every other officer who is especially empowered by the President, are authorized and required at the expense of the United States to institute prosecutions against all persons violating any of the provisions of Section 1990 of this Title or of Sections 5506 to 5516 and 5518 to 5532 of the Revised Statutes, and to cause such persons to be arrested, and imprisoned or bailed for trial before the court of the United States or the territorial court having cognizance of the offense. (R.S. Sec. 1982.)

TITLE 42, UNITED STATES CODE, SECTION 1988

Proceedings in Vindication of Civil Rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights and for vindication, shall be exercised and enforced in accordance with the laws of the United States so long as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution of the State wherein the court having

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jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. Sec. 722.)

TITLE 42, UNITED STATES CODE, SECTION 1989

Commissioners; Appointment of Persons To Execute Warrants

The district courts of the United States and the district courts of the Territories, from time to time, shall increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with crimes referred to in Section 1987 of this Title; and such commissioners are authorized and required to exercise all the powers and duties conferred on them herein with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States. Said commissioners are empowered, within their respective counties, to appoint, in writing, under their hands, one or more suitable persons, from time to time, who shall execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and the persons so appointed shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or the

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militia, as may be necessary to the performance of the duty with which they are charged; and such warrants shall run and be executed anywhere in the State or Territory within which they are issued. (R.S. Sec. 1983, 1984.)

TITLE 42, UNITED STATES CODE, SECTION 1990

Marshal To Obey Precepts; Refusing To Receive or Execute Process

Every marshal and deputy marshal shall obey and execute all warrants or other process, when directed to him issued under the provisions of Section 1989 of this Title. Every marshal and deputy marshal who refuses to receive any warrant or other process when tendered to him, issued in pursuance of the provisions of this section, or refuses or neglects to use all proper means diligently to execute the same, shall be liable to a fine in the sum of \$1,000, for the benefit of the party aggrieved thereby. (R.S. Sec. 1985, 5517.)

TITLE 42, UNITED STATES CODE, SECTION 1991

Fees; Persons Appointed To Execute Process

Every person appointed to execute process under Section 1989 of this Title shall be entitled to a fee of \$5 for each party he may arrest and take before any commissioner with such other fees as may be deemed reasonable by the commissioner for any additional services necessarily performed by him, such as attending at the examination,

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keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination by the commissioner; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction. (R.S. Sec. 1987.)

TITLE 42, UNITED STATES CODE, SECTION 1992

Speedy Trial

Whenever the President has reason to believe that offenses have been, or are likely to be committed against the provisions of Section 1990 of this Title or of Section 5506 to 5516 and 5518 to 5532 of the Revised Statutes, within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and United States attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons so charged, and it shall be the duty of every judge or other officer, when any such requisition is received by him to attend at the place and for the time therein designated. (R.S. Section 1988.)

TITLE 42, UNITED STATES CODE, SECTION 1993

(Repealed Sept. 9, 1957)

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TITLE 42, UNITED STATES CODE, SECTION 1994

Peonage Abolished

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. (R.S. Section 1990.)

TITLE 42, UNITED STATES CODE, SECTION 1995

Criminal Contempt Proceedings; Penalties; Trial by Jury

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however*, That in case the accused is a natural person the fine to be paid shall not exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury; *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of \$300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand

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therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

V.T.C.A., BUS. & C. §2.601

§2.601. Buyer's Rights on Improper Delivery

Subject to the provisions of this chapter on breach in installment contracts (Section 2.612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2.718 and 2.719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (1) reject the whole; or
- (2) accept the whole; or

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(3) accept any commercial unit or units and reject the rest.

(59th Legis., Ch. 721, Sec. 2—601.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §2.606

§2.606. What Constitutes Acceptance of Goods

(a) Acceptance of goods occurs when the buyer

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(2) fails to make an effective rejection (Subsection (a) of Section 2.602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(b) Acceptance of a part of any commercial unit is acceptance of that entire unit. (59th Legis., Ch. 721, Sec. 2—606.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

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V.T.C.A., BUS. & C. §2.608

§2.608. Revocation of Acceptance in Whole or in Part

(a) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it.

(1) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(b) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(c) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. (59th Legis., Ch. 721, Sec. 2—608.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §2.721

§2.721. Remedies for Fraud

Remedies for material misrepresentation or fraud include all remedies available under this chapter for non-

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fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy. (59th Legis., Ch. 721, Sec. 2—721.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §3.409

§3.409. Draft Not an Assignment

(a) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

(b) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance. (59th Legis., Ch. 721, Sec. 3—409.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §3.417

§3.417. Warranties on Presentment and Transfer

(a) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that

(1) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

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(2) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith

(A) to a maker with respect to the maker's own signature; or

(B) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(C) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(3) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith

(A) to the maker of a note; or

(B) to the drawer of a draft whether or not the drawer is also the drawee; or

(C) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(D) to the acceptor of a draft with respect to an alteration made after the acceptance.

(b) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

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(1) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(2) all signatures are genuine or authorized; and

(3) the instrument has not been materially altered; and

(4) no defense of any party is good against him; and

(5) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

(c) By transferring "without recourse" the transferor limits the obligation stated in Subsection (b) (4) to a warranty that he has no knowledge of such a defense.

(d) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority. (59th Legis., Ch. 721, Sec. 3—117.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §4.303

§4.303. When Items Subject to Notice, Stop-Order, Legal Process or Setoff; Order in Which Items May Be Charged or Certified

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(a) Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay any item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or other legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

(1) accepted or certified the item;

(2) paid the item in cash;

(3) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement;

(4) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or

(5) become accountable for the amount of the item under subsection (1) (d) of Section 4.213 and Section 4.302 dealing with the payor bank's responsibility for late return of items.

(b) Subject to the provisions of subsection (1) items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

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V.T.C.A., BUS. & C. §4.403

Customer's Right To Stop Payment; Burden of Proof of Loss

(a) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4.303.

(b) An order is binding upon the bank only if it is in writing, dated, signed, and describes the item with certainty. An order is effective for only six months unless renewed in writing.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer. (59th Legis., Ch. 721, Sec. 4.403.) Acts 1957, 60th Leg., vol. 2, p. 2343, ch. 785, section 1.

 VERNON'S ANN. CIV. ST., ART. 3713, RULE 5

Evidence must relate to facts in issue and to relevant facts.

 VERNON'S ANN. CIV. ST., ART. 3713, RULE 6

Facts are relevant when so connected with a fact in issue as to form part of the same transaction or subject matter.

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VERNON'S ANN. P.C., ART. 1410

(Now Repealed)

Theft is the fraudulent taking of Corporeal personal property belonging to another from his possession or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use and benefit of the person taking.

 VERNON'S ANN. P.C., ART. 1413

(Now Repealed)

The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.